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July 30, 2018

Via Email and First Class U.S. Mail
Dunn Alexandra
Administrator
United States Environmental Protection Agency
Region I, New England
5 Post Office Square
Mail Code: ORA01-4
Boston, MA 02109-3912

Re: *Maine v. EPA,* 1:12-cv-264 (U.S. District Court for the District of Maine)

Dear Regional Administrator Dunn:

I write, on behalf of the Penobscot Nation, with respect to the above-referenced case and the merits brief EPA is required to file today under the Scheduling Order of Judge Levy.

The Penobscot Nation is concerned that EPA may breach its trust responsibility to the Penobscot Nation by failing to file a merits brief that fully defends the Agency's February 2015 decisions disapproving Maine's water quality standards as applied in the Penobscot Nation's reservation sustenance fishery.

Developments over the course of the last five weeks, starting with the EPA and Maine engaging in substantive settlement discussions without the Penobscot Nation and culminating in your announcement on Friday, July 27, 2018, that the EPA has decided to reconsider its decisions, are signs that this breach may be imminent.

The Penobscot Nation's reservation sustenance fishery is held in trust by the United States. *See* Opinion of the Office of the Solicitor Re: Penobscot Indian Reservation Land Status (June 5, 1992), attached as Exhibit A. As such, it constitutes a trust corpus, over which the United States, through the EPA, has a fiduciary obligation to protect.

Further, the United States Department of the Interior (DOI) and the EPA have long-recognized that the Nation's reservation sustenance fishing right is a treaty right and is to be protected as such under fundamental principles of federal Indian law. Those principles are at the foundation of the Agency's February 2015 decisions. They mandate that (a) the Penobscot Nation's fishing

rights "include the subsidiary right to sufficient water quality to render the rights meaningful" and (b) the EPA accordingly protect these rights pursuant to its trust responsibility. *See* Letter from DOI to EPA Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes (Jan. 30, 2015), attached as Exhibit B.

Indeed, since 1997, these have been the standing directives of DOI, the federal agency charged with administering the Maine Indian Claims Settlement Act of 1980. *See* Letter from DOI to EPA Re: Penobscot Indian Nation Request for Evidentiary Hearing Lincoln Pulp & Paper NPDES permit No. ME0002003 (Sept. 2, 1997), attached as Exhibit C. They were reaffirmed by DOI's most recent communication to EPA on April 27, 2018. *See* Letter from DOI to EPA Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes (April 27, 2018), attached as Exhibit D.

EPA has acted consistent with its fiduciary obligation to the Penobscot Nation in fully defending its decisions in this case and working closely with the Penobscot Nation as intervenor to do so. Given above-reference developments over the course of the last five weeks, however, the Penobscot Nation has grave concerns that the EPA may fail to now fully defend its 2015 decisions in its merits brief.

Accordingly, this is to put the EPA on notice that the Penobscot Nation will view such a failure to constitute a breach of the EPA's fiduciary duty to protect a treaty right of the Penobscot Nation and its reservation sustenance fishery, a trust corpus over which EPA serves as trustee on behalf of the Tribe.

Sincerely yours,

Kirk E. Francis

EXHIBIT A

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JUN - 5 1992

BIA.IA.0892

MEMORANDUM

TO: Eastern Area Director, Bureau of Indian Affairs

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Penobscot Indian Reservation Land Status

You have asked that this office reconsider the Department of the Interior's position regarding the status of the Penobscot Indian Reservation lands in light of a recent decision in Cayuga Indian Nation of New York v. Cuomo. The Penobscot Nation has also submitted a request for reconsideration. The Department's position is relevant to at least two hydroelectric projects on the Penobscot River that are in relicensing proceedings before the Federal Energy Regulatory Commission (FERC). The Penobscot Nation is concerned that its fishery resources be considered and protected in the licenses' terms. The Secretary can only impose license conditions protective of the interests of the Nation under Section 4(e) of the Federal Power Act if the United States holds some interest in the Nations' lands.[1] The Secretary may still put forward these interests absent a United States interest in land but without a binding effect on FERC.

In two memoranda, one of April 13, 1983, and one of December 1, 1988, previous Associate Solicitors have concluded that the United States holds no title to the lands within the Penobscot Reservation. Upon review of both memoranda, I find that neither addressed the central question whether the Reservation lands are held in trust by the United States and that it may be concluded that the Penobscot Nation's lands within the Reservation are held in trust.

The 1983 memorandum briefly (in two pages) responded to your question about the applicability of BIA right-of-way regulations

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[1] The Reservation, or some part thereof, must meet the following definition in the Federal Power Act: "tribal lands embraced within Indian reservations, . . . and other lands and interests in lands owned by the United States . . . ." 16 U.S.C. § 796(2). See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). The Secretary, of course, may impose license conditions for fish protection that may incidentally protect tribal interests. See 16 U.S.C. § 803(j).

to Reservation lands. It did not analyse the status of those lands but concluded--without citation: "Since the fee title to the Penobscot Reservation is not held by the United States, this would indicate exclusion of the tribal land of the Nation from any right to annual charges under the Federal Power Act." This conclusion followed from the assumption that "such land is apparently held by the State of Maine in trust for the Nation subject to federal restrictions against alienation." The citation given for this statement was 25 U.S.C. § 1724(g)(2), which makes no reference to ownership.[2]

The 1988 memorandum assumed the correctness of the 1983 memorandum's conclusion and went on to answer the question whether the United States owns a Federal Power Act (FPA) "proprietary interest" in Reservation lands based on trust obligations imposed by the Maine Indian Claims Settlement Act, Pub. L. No. 96-420, codified at 25 U.S.C. §§ 1721-1735 (MICSA). The memorandum concluded that the United States did not but correctly stated that "[n]o blanket statements can be made concerning whether Penobscot Reservation lands are 'reservation' lands for purposes of the FPA."

The key question of Reservation ownership remains unanswered by these memoranda. To answer it, the decision in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (Tuscarora), must be considered and the meaning of the language of MICSA must be discerned and applied to the facts of the Penobscot situation.

In Tuscarora the Supreme Court held that Indian reservation lands in which the United States did not hold a proprietary interest were not reservation lands under the FPA. The Tuscarora lands were unusual for a number of reasons. First, the lands were in New York, some distance from the Tuscarora Nation's aboriginal home in North Carolina. Second, the lands were purchased by the

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[2] The full text is as follows:

Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (A) takings for public uses consistent with the Maine Implementing Act, (B) takings for public uses pursuant to the laws of the United States, or (C) transfers of individual Indian use assignments from one member of the Passamaquoddy Tribe or Penobscot Nation to another member of the same tribe or nation, shall be void ab initio and without any validity in law or equity.

The referenced paragraph (3) gives the statutes under which such land may be leased, sold, or subjected to rights-of-way. It too is silent on ownership of the lands.

Nation with proceeds from the sale of its North Carolina lands. Finally, the Court emphasized, no treaty or statute confirmed the reservation to the Nation. Id. at 124.

The Court examined these unique facts and determined that Congress did not intend the protections of the FPA to extend to such privately held Indian lands. Simply "no 'interest' in them is 'owned by the United States,'" so "they are not within a 'reservation' as that term is defined and used in the Federal Power Act." Id. at 111.

MICSA was passed to resolve major outstanding claims to land in the State of Maine, including those of the Penobscot Nation. It ratified the Maine Indian Claims Implementing Act of 1979, 30 M.R.S.A. §§ 6201-6214 (the Implementing Act). MICSA described the Penobscot Reservation by reference to the Implementing Act as follows:

> the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian [or Old Town] Island and all islands in said river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818.

25 U.S.C. § 1722(i), citing 30 M.R.S.A. § 6203.8.

These lands in the Penobscot River were at the center of the Penobscot aboriginal territory. House Report No. 96-1353, Sept. 19, 1980, 1980 U.S.C.C.A.N. 3786, 3787; see Handbook of North American Indians, Northeast, B. G. Trigger, ed, at 137 (Smithsonian 1978). MICSA confirmed the Reservation to the Nation by ratifying the Implementing Act. 25 U.S.C. § 1721(b). However, MICSA is not altogether clear as to the land tenure of the Reservation. The Act contemplates both trust and restricted land within the Reservation both expressly and by negative implication. In Section 5(i) of MICSA, the following language appears:

> (1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted

> status as the land taken.
> (2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. . . .

25 U.S.C. § 1724(i). The reference to "trust or restricted land . . . within the Penobscot Indian Reservation" indicates Congress's understanding that both types of land tenure would exist there. The reference to trust land "not within the . . . Penobscot Reservation" implies that Congress understood that the Reservation would include trust land. Otherwise, it would not be necessary to qualify the statement by referring to the Reservation.

Another provision of Section 5 ties land tenure to location. Where the United States acquires land for the Nation within Penobscot Indian Territory, as defined, "the first 150,000 acres . . . shall be held in trust for the benefit of the [Penobscot] nation." Penobscot Indian Territory includes the Penobscot Reservation. 25 U.S.C. § 1722(j), incorporating by reference 30 M.R.S.A. § 6205.2. Land acquired outside of Penobscot Indian Territory "shall be held in fee by the [Penobscot] nation."

While acknowledging that MICSA is not a model of clarity, we think the above provisions demonstrate the trust character of at least some of the lands within the Reservation. In support of this conclusion, we cite the anomalous land tenure result of reaching a different conclusion and the canons of Indian statutory construction.

If the Nation's Reservation lands were only held in restricted fee status, the bizarre result of a donut of trust lands would occur. The hole of the donut--the Reservation--would be in restricted fee status. The donut surrounding that area would be tens of thousands of acres of tribal trust lands. Surrounding that area is tribal fee land. Nowhere else does such a pattern of Indian land tenure exist.

More importantly, we are bound to follow the canon of Indian statutory construction that ambiguous provisions are interpreted to the benefit of the affected Indians. See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, ___ U.S. ____, 112 S.Ct. 683, 693 (1992). Undeniably, MICSA is a statute enacted for the benefit of the Penobscot Nation, among others. It confirmed its existing landholdings, confirmed and provided a number of federal protections on its lands, and provided the Nation with compensation for its lost lands. The benefit is also clear--holding the lands in trust enables the Nation to call upon the Secretary to condition the licenses of hydroelectric operators upon their taking measures to

protect the Nation's fisheries and other resources.

MICSA, on this point, is a good example of an ambiguous Indian statute. Here, there is no statement that the Reservation lands are to be held in trust as opposed to restricted fee status. Nor is there any statement that these lands are not to be held in trust. Indeed, the only support for the proposition that the lands are not to be held in trust comes from the Special Issues segment of the House Report on MICSA. Responding to a concern that "[i]ndividual Indian property . . . will be taken in the settlement," the Interior Committee noted that:

> The settlement envisions four categories of Indian land in Maine: Individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member.

House Report No. 96-1353, Sept. 19, 1980, 1980 U.S.C.C.A.N. 3786, 3791. The Report goes on to specify the protections for individual Indian landowners.

The import of this response seems clear--only restricted fee lands lie within the reservations.[3] Yet the language of MICSA is "[t]rust or restricted land . . . within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation." This conflict may well stem from understandable confusion on the part of the Committee. A theory held by New York State at the time was that the original states--to one of which Maine, of course, is a successor--held the underlying fee to Indian lands within their boundaries, even those within federal Indian reservations.

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[3] FERC came to this conclusion in Bangor Hydro-Electric Co., 27 F.E.R.C. 61,467 (1984). However, FERC relied on a letter based on the 1983 Associate Solicitor's Memorandum on this subject and the House Report language. We have noted that the 1983 Memorandum is conclusory on the question of Reservation land status. The House Report does not address the language of MICSA with its reference to trust lands on the Reservation. FERC, too, did not address this statutory language. For these reasons, we do not find the FERC decision to be instructive.

Presumably, the Committee knew of the theory and that under it Maine held some interest in the Reservation. This confusion appears to be dispelled by the recent decision in Cayuga Indian Nation of New York v. Cuomo, 758 F.Supp. 107 (N.D.N.Y. 1991), to which you refer in your request for review of this issue. The court held that the State of New York owned no interest in Indian lands within the Cayuga Indian Reservation. Any interest it may have held was ceded to the United States by ratification of the United States Constitution. "Once New York State ratified the United States Constitution, relations with Indian tribes and authority over Indian lands fell under the exclusive province of federal law." Id. at 116. It is unclear what impact Cayuga may have on state Indian reservations in the original United States. Cayuga confirms, however, that no later than MICSA's granting of federal status to the Penobscot Reservation, whatever interest Maine may have held in the lands was surrendered to the United States.

Given the injunction of the canon of Indian statutory construction, we are obliged to find trust status in Reservation lands. Still, the language of the House Report may be given meaning based on the question being answered without doing damage to this interpretation of the MICSA language. The Committee was addressing a question raised by individual Indian landowners on individual land tenure--not a concern of the tribes about tribal interests in land. Those individually assigned lands on the Reservation were intended to be held in restricted fee and the Committee appears to be reassuring those Indian landowners that the United States would not be the legal owner of their lands and, therefore, would not potentially divest them of individual property rights.[4]

The House Report is not one-sided on this point. It does lend some support to the trust status of the Reservation. The section-by-section analysis states that "the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts . . . ." Id. at 3794. Tribal lands within federally recognized Indian reservations are typically held in trust. Furthermore, it must be assumed, at a minimum, that the Interior Committee knew of the Tuscarora decision and that basic protection of the rights of a riverine tribe depended on a sufficient federal interest in Indian land to invoke the license condition provision of the Federal Power Act.

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[4] Under the reasoning of Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), these lands were already subject to 25 U.S.C. § 177, which imposed the restriction on alienation on all lands in which a tribe has an interest. See Memorandum of the Solicitor to Executive Assistant to the Secretary of July 8, 1976.

MICSA clearly presents an ambiguity. The Department must give precedence to a reading that redounds to the Nation's benefit. The interpretation that benefits the Nation recognizes the presence of both trust and restricted lands on the Reservation. Thus, any conflicting committee comment on the unassigned lands of the Nation is overridden by the meaning of the statutory language. The only reading of the comment that we can give effect given the MICSA language is that tribal lands would be held in trust and the individual assignment lands would be held in restricted fee.

I find that the Penobscot situation is distinguishable from that in Tuscarora. Some of the tribal lands within the Penobscot Reservation are held in trust, in stark contrast to the fee title of all of the Tuscarora lands.

While I conclude that the United States holds the Penobscot Nation's reservation lands in trust, I note that the Secretary's conditioning power under the Federal Power Act may well extend to tribal restricted fee land within a reservation as well. To return to Tuscarora, the uniqueness of the Tuscarora lands is clear. That case does not deal with the typical restricted fee reservation, such as those of the Pueblos, which unquestionably are cloaked with the protection of the federal trust based on treaties and statutes of the United States. See United States v. Candelaria, 271 U.S. 432 (1926). Rather, the Court in Tuscarora found no treaty or statute confirming the Tuscarora lands or guaranteeing their protection by the United States. 362 U.S. at 105-106, 123-124.

Prior to the enactment of MICSA, Congress had not acknowledged any duty to the Penobscot Nation or its lands. Congress had not ratified any treaty or agreement with the Nation. Nor had Congress undertaken any commitments--either by treaty with another nation or by statute--to the Nation. The Penobscot Nation and the Tuscarora Nation were thus similarly situated. MICSA altered the mix, guaranteeing protection, albeit limited,[5] for the Nation's lands.

MICSA was crafted against the backdrop of the Passamaquoddy decision. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), held that the United States had a duty to protect tribal title to property in Maine, even if the property was held in fee simple by the tribe. Congress acted accordingly when it acknowledged the restricted fee of Passamaquoddy and Penobscot tribal lands in MICSA. Passamaquoddy

[5] MICSA was unique in this regard in providing for state condemnation of tribal land "for public purposes." 25 U.S.C. § 1724(i).

did not define the limited duty but left this to the Secretary. Congress inserted § 4(e) into the FPA for the purpose of protecting Indian lands it understood it had a duty to protect. This congressional action and Tuscarora came prior to the Passamaquoddy decision and the understanding that the United States had a duty to protect tribal lands in Maine. The Secretary's discretion to define his duty under Passamaquoddy would reasonably extend to setting license conditions necessary to protect tribal interests in restricted fee lands on reservations.

MICSA went further than simply acknowledging a duty to protect lands, however. It appears to have created a proprietary interest in the restricted fee reservation lands. Section 5 of the Act requires that the proceeds from any restricted lands condemned under federal law be used to acquire land to be held in trust by the United States. 25 U.S.C. § 1724(j). Upon sale of the lands, the proceeds are held in trust. This degree of control over property may well be enough to satisfy the § 4(e) requirement of some proprietary interest in tribal lands. It presents an important distinction from Tuscarora.

Where the restricted fee of reservation lands is guaranteed by a statute such as MICSA, enacting a settlement to which the United States is a party, it is reasonable to conclude that Congress considers the United States to have a proprietary interest in the lands central to the settlement--an interest sufficient for § 4(e) purposes. The Penobscot Nation Reservation lands are in this category.

Catherine E. Wilson

Catherine E. Wilson

EXHIBIT B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

JAN 30 2015

Avi S. Garbow
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes

Dear Mr. Garbow:

The State of Maine has submitted proposals to the Environmental Protection Agency (EPA) to implement Water Quality Standards (WQS) within waters set aside for federally recognized tribes under applicable state and Federal law for uses including sustenance fishing (hereinafter described as Maine Indian Waters).[1] To assist in your review of Maine's proposals, you have asked for the Department of the Interior's views regarding tribal fishing rights in Maine and particularly the relationship between tribal fishing rights and water quality. We have reviewed applicable law and, for the reasons explained below, conclude that all four of the Maine tribes—the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs—have federally-protected tribal fishing rights. These fishing rights should be taken into account in evaluating the adequacy of WQS in Maine.

1. Overview of Tribal Fishing Rights in Maine Indian Waters

As you are well aware, the four federally recognized Indian tribes in the State of Maine are subject to a unique statutory framework established by the state-law Act to Implement the Maine Indian Claims Settlement ("Maine Implementing Act"),[2] the state-law Micmac Settlement Act,[3] the federal Maine Indian Claims Settlement Act ("MICSA"),[4] and the

[1] We note that the exact boundaries of at least some Indian lands and territories in Maine remain in dispute. For example, the United States has intervened in a lawsuit filed by the Penobscot Nation against Maine claiming that the Penobscot Reservation includes waters in the Main Stem of the Penobscot River. *See* Order on Pending Motions in *Penobscot Nation v. Mills*, 1:12-cv-00254-GZS (D. Maine Feb. 4, 2014) (granting US motion to intervene) . It is beyond the scope of this letter to precisely identify all Maine Indian Waters. The location of Maine Indian Waters for each Tribe would have to be defined based on all applicable law, including statutory language, applicable property law doctrine, and lands reserved by treaty and retained by the tribes pursuant to statute. We do not elaborate here on the question of whether the Maine tribes have additional fishing rights outside of Indian lands and territories.

[2] 30 M.R.S. §§ 6201 *et seq.*

[3] 30 M.R.S. §§ 7201 *et seq.*

[4] 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act[5] (collectively the "Settlement Acts").[6]

There is no dispute that the four Maine tribes have historically engaged in fishing in Maine waters and that fishing is an important cultural and economic activity for Maine tribal members.[7] Because of differences in their history and applicable statutory language, the fishing rights of the two Southern Tribes—the Passamaquoddy Tribe and the Penobscot Indian Nation— derive from different legal sources than the fishing rights of the Northern Tribes—the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. But all Maine tribes possess fishing rights that EPA should consider when analyzing proposed water quality standards in Maine.

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters[8] are expressly reserved[9] fishing rights: the Maine Implementing Act

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[5] P.L. 102-171, 105 Stat. 1143 (1991).

[6] In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1725(i). Federal recognition was extended to the Aroostook Band of Micmacs eleven years later with the enactment of P.L. 102-171 (Sec. 6(a)), so now these four Maine tribes are recognized as eligible for the rights and benefits of Indian tribal status. *See generally* 25 U.S.C. § 479a-1(a) (providing for listing of federally recognized tribes that are all entitled to "services provided by the United States to Indians because of their status as Indians").

[7] Notably, several standalone provisions in Maine law recognize and arguably encourage the continuing centrality of fishing to the traditions and health of Maine tribes. First, the State of Maine recognizes and facilitates fishing as a central part of tribal culture by issuing permits to tribal members to fish in Maine waters at no cost. 12 M.R.S. § 10853(8). Second, the State has enacted legislation providing for special treatment of tribal members engaged in fishing for marine organisms, exempting them from many state permitting requirements and providing a broad exemption for many tribal sustenance and ceremonial uses. 12 M.R.S. § 6302-A. Concerns of the tribes with the process by which this language was adopted and objections to the definition of sustenance are explained in a recent report by the Maine Tribal-State Commission. Me. Indian Tribal-State Comm'n, *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* (June 17, 2014), *available at* http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf ("Commission Saltwater Fisheries Report").

[8] 30 M.R.S. § 6203(5) (defining Passamaquoddy Indian Reservation as "those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794" except for lands transferred by the Tribe after these treaties but before enactment of the Maine Implementing Act, and with certain additional specifications); § 6203(8) (defining Penobscot Indian Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" except for islands transferred by the Tribe after these treaties but before the enactment of the Maine Implementing Act and with the addition of other specifically enumerated parcels). Legislative history confirms that the Reservations include riparian and littoral rights under State law or treaties:

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law.

State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[9] A reserved right is a right that has been retained since aboriginal times. Section 6207(4)'s sustenance fishing right applies within these Reservations retained by the Southern Tribes first under treaties and now under the Settlement Acts, see *supra* note 8, since aboriginal times. Congress used an apt phrase that

acknowledges the right of Penobscot Nation and Passamaquoddy members to "take fish . . . for their individual sustenance" within their reservations free of state regulation.[10]

These statutorily-acknowledged fishing rights are rooted in treaty guarantees[11] that were upheld through the Settlement Acts. The Passamaquoddy Tribe's 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees "to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation."[12] The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to "pass and repass" the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.[13]

The Maine Implementing Act further provides for tribal sustenance fishing in certain ponds on lands located outside the Southern Tribes' reservations, but held in trust by the United States as part of the Indian territories established under the Settlement Acts. The Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands which "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation."[14] The Maine Implementing Act also includes special provisions for

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captures the reserved right concept in the legislative history for the Federal Maine Indian Claims Settlement Act, characterizing fishing rights as an example of natural resources considered "expressly retained sovereign activities." H.R. Rep. No. 96-1353 at p 15 (1980).

[10] This reading is established by language in 30 M.R.S. § 6207(4):

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6 [providing for the State to limit tribal fishing if necessary to protect the stock of fish].

State regulation is allowed only in the case of conservation necessity, as laid out in the Maine Implementing Act at 30 M.R.S. § 6207(6).

[11] These treaties were State treaties, negotiated not with the United States but with the Commonwealth of Massachusetts; Maine later adopted the responsibility to implement these treaties in its state constitution. See Maine Constitution, Art. X, Sec. 5:

> The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise.

Available at http://www.maine.gov/legis/lawlib/const1820.pdf. (Note that per Art. X, Sec. 7, the text quoted here is omitted from printed copies of the Maine Constitution, but still remains in force and effect.). The Settlement Acts preempt any contrary language in the treaties, but the legislative history discussed in *supra* note 8 explains that expressly reserved riparian rights under the treaties were retained under the Settlement Acts.

[12] The text of the treaty is available at http://www.wabanaki.com/1794_treaty.htm.

[13] *See, e.g., Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 86-89 (1918) (holding that where Congress set aside lands for the Metlakahtla Indians, a fishing tribe, it impliedly reserved fishing rights in the adjacent waters).

[14] 30 M.R.S. § 6207(1).

regulation of certain waters by the Maine Indian Tribal-State Commission.[15] Thus, through the Maine Implementing Act, the State has recognized the Southern Tribes' sustenance fishing rights within their territories, and the importance of fish to tribal members' diet.

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."[16] Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . . especially the reference to the right of taking fish."[17] The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly[18] to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,[19] with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.[20] When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

The sources of the fishing rights of Maine's Northern Tribes are different in that they are not discussed explicitly in the Settlement Acts. However, express language in a statute or

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[15] The Commission is an intergovernmental body made up of members appointed by the Tribes and the State. 30 M.R.S. § 6212. 30 M.R.S. § 6207(3) authorizes the Commission to promulgate fishing rules and regulations within specified waters on or adjoining the Penobscot Nation's and Passamaquoddy Tribe's territories, taking into account the "needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes."

[16] *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). The Indian canons of construction have been held to apply to interpretation of the Settlement Acts. *See infra* note 48 and accompanying text.

[17] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 678 (1979).

[18] Tribes have argued that in addition to fishing for individual consumption, the definition of sustenance traditionally incorporated two other components: barter and exchange. Commission Saltwater Fisheries Report, *supra* note 7, at p. 22-23

[19] A study prepared for EPA in collaboration with the Maine Tribes discusses what level of fish consumption is representative of sustenance fishing in Maine Indian waters. Harper, Barbara and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, prepared for EPA in collaboration with the Maine Tribes, July 9, 2009, available at http://www.epa.gov/region1/govt/tribes/pdfs/DITCA.pdf.

[20] This statutory provision establishing a right of the State to regulate in limited situations of conservation necessity is consistent with the federal common law rule. *See United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1990) (describing findings that court must make in order to uphold regulation of treaty rights to take fish, including that "States must consider the protection of the treaty right to take fish . . . as an objective co-equal with the conservation of the fish runs for other uses"); *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) ("Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.").

treaty is not necessary to establish the existence of a tribal fishing right.[21] Tribal fishing rights are implied through an analysis of the purpose of these land settlements—to create a permanent land base—and the trust property interests created pursuant to the Acts. As described below, these fishing rights are also rooted in state common law on the right of riparian owners to fish on their properties in addition to the Settlement Acts and federal common law on the importance and durability of tribal fishing rights.

The fundamental requirement for a fishing right is access to fishable waters, and legislative history for the Maine Implementing Act specifically addresses the issue of the tribes' access to waters in connection with their trust lands:

> Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law.[22]

This language allows for riparian rights to attach to the tribal trust lands held by the United States for the Northern Tribes, which are acquired by purchase and then put into trust.[23] In Maine, a right to fish is a right "included by general principles of law" when riparian lands are acquired,[24] and this language thus confirms that Maine's legislature recognized the right of the Maine tribes to engage in fishing on their reservation and trust

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[21] The hunting and fishing rights that were held to survive termination of the Tribe's status as a federally recognized tribe in the seminal case *Menominee Tribe of Indians v. United States* were created by treaty language providing that tribal land would be "held as Indian lands are held." 391 U.S. 404, 405-06 (1968). *See also United States v. Dion*, 476 U.S. 734, 738 (1986) (explaining that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress," and that these rights need not be expressly mentioned in the treaty). State regulatory jurisdiction is not incompatible with a tribal fishing right; the existence of state laws dealing with tribal fishing in Maine, *see supra* note 7, reinforces that the State acknowledges the importance of tribal fishing rights. Carole E. Goldberg et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1177-78 (6th ed. 2010) ("It is important to see that jurisdictional protections supplement rather than displace tribal property rights to hunt and fish.").

[22] State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[23] *See* 25 U.S.C. § 1724(d)(4) (providing for "land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band"); 30 M.R.S. § 6205-A (providing for acquisition of "Houlton Band Trust Land"; P.L. 102-171, 105 Stat. 1143, § 5 (providing for acquisition of "Aroostook Band Trust Lands"); 30 M.R.S. § 7202(2) (defining Aroostook Band Trust Land).

[24] The right of riparian landowners to fish is predicated on both State and federal common law. Based on the default Maine property rule, owners of riparian land also own out to the thread, or middle, of most streams. *Wilson & Son v. Harrisburg*, 107 Me. 207, 211 (1910) ("With respect to the rights of the riparian proprietor in floatable and non-tidal streams, it is the settled law of this State that he owns the bed of the river to the middle of the stream and all but the public right of passage."). Riparian property owners have the right to fish on their lands. *See* Answers to Questions Propounded to the Justices of the Supreme Judicial Court by the House of Representatives, 118 Me. 503, 507 (1919) (noting that "[t]he riparian proprietor has the right to take fish from the water over his own land").

lands alike when these lands are riparian to fishable waters. On the Northern Tribes' trust lands, this right is subject to reasonable State regulation.[25]

Even more importantly, however, the Northern Tribes[26] have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,[27] and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.[28] Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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[25] The Settlement Acts provide that State law applies to the trust lands of the Northern Tribes. We describe this as a right of "reasonable regulation" because the Settlement Acts did not contemplate and should not be read to allow State law that is discriminatory against tribes or not consistent with the Settlement Acts, including the federal purpose of holding this land base in trust. In section 1725(a) of MICSA, Congress approved 30 M.R.S. § 6204 of the Maine Implementing Act regarding the application of state law to Indian lands, specifying that Maine civil and criminal law would generally apply to these lands. While conferring civil and criminal jurisdiction on the State of Maine over the Northern Tribes' trust lands, nothing in section 1725 abrogates federal authority to protect these tribal trust lands. 25 U.S.C. § 1725(a) reads:

> Except as provided in section 1727(e) [dealing with Indian Child Welfare Act definitions] and section 1724(d)(4) [regarding acquisition of land and natural resources for the Houlton Band of Maliseet Indians] of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

[26] This discussion is aimed at the Northern Tribes, but we note that some of the Southern Tribes' Territories include lands held in trust that would have fishing rights based on this same trust land focused analysis. Some, but not all, of these lands have fishing rights confirmed through other statutory language, *see supra* notes 14-15 and accompanying text.

[27] For the Houlton Band of Maliseet Indians, 30 M.R.S. § 6205-A(3) describes restraints against alienation of these trust lands. The same language applying to the trust land of the Aroostook Band of Micmacs,is found at 30 M.R.S. § 7204(3). With respect to the Micmacs, legislative history is even plainer that Congress intended the trust lands to provide a land base for subsistence purposes: "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century . . . .Today, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." S. Rep. No. 102-136 at 5, 9 (1991) (quoting testimony of Dr. Harold E.L. Prins).

[28] Even for the Northern Tribes, the Maine Implementing Act recognizes that the tribes may retain certain aspects of governmental authority over tribal members. For example, 30 M.R.S. §6209-C(1)(a) provides:

> The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over . . . [c]riminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians, except when committed against a person who is not a member of the Houlton Band of Maliseet Indians or against the property of a person who is not a member of the Houlton Band of Maliseet Indians.

practices, which fosters tribal self-determination.[29] The legislative history for MICSA supports the view that one of Congress's purposes in providing Maine tribes with a land base was to preserve their culture.[30] The connection between fishing rights and land ownership is particularly emphasized in the Settlement Acts: the Maine Implementing Act defines the "land or other natural resources" to be purchased with federal funds and placed into trust as "any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and *fishing rights*."[31] The exercise of these fishing rights by Tribes is fully consistent with the Settlement Acts.[32]

In sum, the Federal Government as the owner of the trust lands for the benefit of the Tribes has a substantial interest in providing all Maine tribes, including the Northern Tribes, with a functional land base that ensures the continuation of their sustenance practices and cultural activities.[33]

2. Tribal Fishing Rights Include the Subsidiary Right to Sufficient Water Quality to Render the Rights Meaningful.

In Maine, EPA must determine how tribal fishing rights intersect with EPA's authority under the Clean Water Act to approve or disapprove State WQS. We are not aware of any case law addressing an identical situation to the one raised by Maine's proposed WQS. However, Federal courts have acknowledged the importance of permanent, enforceable fishing rights for tribes and have interpreted these rights expansively.

Tribal fishing rights encompass subsidiary rights that are not explicitly included in treaty or statutory language but are nonetheless necessary to render them meaningful. For example, in the 1905 case *United States v. Winans*, the Supreme Court held that a tribe must be allowed to cross private property to access traditional fishing grounds.[34]

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[29] *See* Final Rule, Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67929 (November 13, 2013) (noting in Background section that taking land into trust serves the "goals of protecting and restoring tribal homelands and promoting tribal self-determination" and "reaches the core of the Federal trust responsibility").

[30] Sen. Rep. No. 96-957, at 17 ("Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine."). Several of the Maine tribes submitted comments to the EPA about Maine's WQS describing the centrality of fishing to their cultures.

[31] 30 M.R.S. § 6203(3) (Emphasis added). MICSA includes this definition almost verbatim at 25 U.S.C. § 1722(b). 25 U.S.C. § 1724(d) authorizes the Secretary to "expend . . . the land acquisition fund for the purpose of acquiring land or *natural resources* for the . . . . Houlton Band of Maliseet Indians." Emphasis added. Section 5(a) of the Aroostook Band of Micmacs Settlement Act, P.L. 102-171, provides similarly that the Secretary is authorized "to expend . . . the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band" and defines natural resources to include fishing rights at section 3(4).

[32] Recognizing that Maine tribes have a tribal fishing right would not impinge upon Maine's right to regulate such a fishing right. The existence of a tribal fishing right does not affect or preempt Maine's regulatory jurisdiction as described in 25 U.S.C. § 1725(h).

[33] See *supra* note 30 and accompanying text.

[34] 198 U.S. 371, 384 (1905).

Similarly in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit held that a tribe's fishing right could be protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch.[35] In *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, the Sixth Circuit found that the treaty right to fish commercially in the Great Lakes includes a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially.[36] While the issues presented by diminished water quality in Maine are different from the issues presented by inadequate access to fishing places or the need to protect fish populations, the result for tribes if water quality in Maine Indian Waters is not protected is the same: Indian tribes will not be able to fish for their sustenance healthfully.

The rules in the cases identified above are all variations on the fundamental holding of *Washington v. Washington State Commercial Passenger Fishing Vessel Association* that tribes with reserved fishing rights are entitled to something more tangible then "merely the chance . . . occasionally to dip their nets into the territorial waters."[37] The holding of *Washington*, while specific to the treaty language at issue in that case, is consistent with similar holdings from other courts examining the question of whether a tribal fishing right implicitly contains within it the right to additional protections to render the fishing right meaningful. For example, in holding that a Tribe's hunting and fishing rights persisted, the Minnesota Supreme Court explained that "[c]ertainly, it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home."[38]

In the context of water quantity, courts have recognized that tribal fishing rights include the subsidiary right to water flow sufficient to maintain fish health and reproduction in order to effectuate the fishing right. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle."[39] The logic that supports the tribe's right to water quantity adequate to support a lifestyle based on fishing in *Adair* supports a conclusion that EPA should take tribal fishing rights into account when reviewing Maine's water quality standards. If water quality diminishes to the point where the fish are no longer safe to eat or able to reproduce, tribal fishing rights will suffer a diminution just as surely as they suffer from inadequate quantity of water to support fish.[40]

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[35] 763 F.2d 1032, 1034-35 (9th Cir. 1985).
[36] 141 F.3d 635, 639-40 (6th Cir. 1989).
[37] 443 U.S. 658, 679 (1979).
[38] *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).
[39] 723 F.2d 1394, 1409-10 (9th Cir. 1983). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).
[40] The leading federal Indian law treatise explains:

Ongoing litigation in Washington State involving questions about the extent to which tribal fishing rights encompass associated rights to protection for fish habitat also informs our analysis.[41] The tribes and the United States have argued that tribal fishing rights impose a duty on the state of Washington to refrain from building or maintaining road culverts that directly block fish passage both to and from breeding areas and therefore significantly and directly kill fish, diminish fish populations, and diminish habitat.[42] In 2013, the court adopted this analysis, concluding that the tribes' treaty based fishing right had been "impermissibly infringed" through the construction and operation of culverts that "has reduced the quantity of quality of salmon habitat, prevented access to spawning grounds, reduced salmon production . . . and diminished the number of salmon available for harvest."[43] The court issued a permanent injunction forcing the State to renovate its culvert system.[44] The decision is currently on appeal, but the district court's reasoning is consistent with the view that tribal fishing rights can be protected under the Clean Water Act.

When diminished water quality has hindered tribal uses of water outside the fishing context, courts have held for tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. In an Arizona case, *United States v. Gila Valley Irrigation District*, farmers with a more junior right whose properties were located upstream from a reservation were required to take steps to decrease the salinity of the tribe's water so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[45] Other courts have noted that in some situations protecting water

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> Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . . [H]abitat protection is an integral component of the reserved [fishing] right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

[41] The United States District Court for the Western District of Washington court held that several Washington State tribes' treaty fishing rights "implicitly incorporated the right to have the fishery habitat protected from manmade despoliation." *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (Phase II). The court explained that "the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless." *Id.* at 205. That decision was vacated on procedural grounds. *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (requiring plaintiffs to allege specific environmental harms before any declaratory judgment could issue, noting that "[i]t serves neither the needs of the parties . . . nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension").

[42] In *United States v. Washington*, 2007 U.S. Dist. LEXIS 61850, 37-38 (W.D. Wash. Aug. 22, 2007), the district court held in favor of the federal and tribal plaintiffs.

[43] *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. 2013).

[44] *Id.* at 78-79.

[45] 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), aff'd, 117 F. 3d 425 (9th Cir. 1997).

quality is fundamental to the protection of tribal rights to self-determination.[46] Given the importance of fishing to Maine tribes, protection of water quality sufficient to enable the tribes to continue to fish and to consume the fish they are able to catch is comparable to protecting water quality to allow the tribe in the *Gila Valley* case to continue to grow crops.

In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption. If third parties are free to directly and significantly pollute the waters and contaminate available fish, thereby making them inedible or edible only in small quantities, the right to fish is rendered meaningless. To satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption at sustenance levels.

3. The Trust Relationship Counsels Protection of Tribal Fishing Rights in Maine

EPA has already recognized that Maine tribes' fishing rights should be considered in regulating water quality in a 2003 decision regarding Maine's authority to issue permits under the Clean Water Act.[47] As EPA noted in that decision, the First Circuit has held that the Indian law canons of construction obliging courts to construe statutes which diminish the "the sovereign rights of Indian tribes . . . strictly" apply to the Maine tribes and that the requirement that ambiguity be interpreted in favor of tribes is "rooted in the unique trust relationship between the United States and Indians."[48]

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act[49] it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."[50] EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.[51]

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[46] *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d. 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").

[47] 68 Fed. Reg. 65052, 65068 (Nov. 18, 2003).

[48] *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks omitted).

[49] The EPA specifically cited the provision codified at 33 U.S.C. § 1342(d).

[50] 68 Fed. Reg. at 65,068.

[51] The First Circuit, reviewing this EPA decision in *Maine v. Johnson,* found that EPA's analysis of the relationship between fishing rights and water quality was not ripe for consideration. 498 F.3d 37, 48 (1st Cir. 2007) ("The current relationship of the United States to [Maine] tribes, and the EPA's continued authority under the Clean Water Act to review Maine's exercise of ceded powers, present quite different

Secretary Jewell has recently reaffirmed the federal trust responsibility to tribes. Consistent with the principles of Secretarial Order 3335 on Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes, federal agencies should "[e]nsure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected."[52] In addition, consultation is a critically important part of the United States' government to government relationship with tribes, and the EPA should continue to fully consult with tribes regarding decisions that have implications for trust resources, including fishing rights.[53]

4. Conclusion

The Maine tribes rely on clean water, and in particular, on water of a quality sufficient to allow the tribes to engage meaningfully in fishing in Maine Indian Waters. Maine tribes rely on fish as a dietary staple and vital component of their cultures, and a diminution in their ability to take fish at sustenance levels results in a loss of food as well as a threat to their ability to carry on their traditions.

The Maine tribes have fishing rights connected to the lands set aside for them under federal and state statutes. Further, these fishing rights would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for their sustenance. The right of all four tribes to take fish is well-founded under State as well as Federal law as discussed in this letter.

Thank you for your attention to these matters of great importance to the Maine tribes. I appreciate the opportunity to submit these views for your consideration.

Sincerely,

Hilary C. Tompkins
Solicitor

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questions [from the ones decided in the case]. . . . [W]e take no view today as to the ultimate resolution of these potential issues.").

[52] Secretarial Order 3335 (August 20, 2014), Sec. 5, Principle 2, *available at* http://www.usbr.gov/native/policy/SO-3335_trustresponsibility_August2014.pdf.

[53] *See generally,* Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000).

EXHIBIT C

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Control
OEC - T. Williams
cc: S. Silva
L. Murphy

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

SEP 2 1997
RECEIVED: OFFICE OF THE REGIONAL ADMINISTRATOR

Date: 9/19/97

#01-9700711

John P. DeVillars
Regional Administrator
Environmental Protection Agency
Region 1
J.F.K. Federal Building
Boston, MA 02203-0001

Re: Penobscot Indian Nation Request for Evidentiary Hearing
Lincoln Pulp & Paper NPDES permit No. ME0002003

Dear Mr. DeVillars:

The Department of the Interior (Department) has reviewed the correspondence filed with you by the Penobscot Indian Nation (PIN), Lincoln Pulp and Paper Company (Lincoln), and the State of Maine, Department of the Attorney General (State), in the above-referenced Request for Evidentiary Hearing concerning NPDES Permit No. ME0002003. Certain of the positions set forth in those filings cause concern to this Department, in its role as primary agency within the Federal Government charged to act on behalf of Indian Tribes. Consequently, my intent in this letter is to ensure that your agency is fully aware of the positions of this Department, and of the United States, concerning certain issues relevant to the Maine Indian Claims Settlement Act, the Federal Trust responsibility to Maine Indians, and the fishing rights of the Penobscot Indian Nation.[1]

I address three major points, as follows:

1. <u>The Nature of the Federal Government's trust responsibility to the PIN;</u>

2. <u>Interpretation of PIN's fishing rights;</u>

3. <u>PIN's right to appeal the NPDES permit</u>

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[1] The First Circuit has recognized the Secretary of the Interior as the administrator of the Maine Indian Claims Settlement Act (MICSA). <u>Passamaquoddy Tribe v. State of Maine</u>, 75 F.3d 784, 794 (1st Circuit, 1996). Moreover, the Department of the Interior is recognized to have reasonable power to discharge effectively its broad responsibilities in the area of Indian affairs, and its actions in interpreting tribal rights are accorded substantial deference. <u>Parravano v. Babbitt</u>, 70 F.3d 539, 544 (9th Cir. 1995), <u>cert. denied</u>, 116 S. Ct. 2546 (1996).

1. The Nature of the Federal Government's trust responsibility to the PIN

As you know, the United States has a trust responsibility to protect the lands and resources of federally recognized Indian Tribes. In the exercise of this trust responsibility, the United States is held to the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286 (1942). This fiduciary responsibility extends to all agencies of the Federal Government, including the Environmental Protection Agency (EPA). Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981).

The Department acknowledges that the Maine Tribes came late to federal recognition and protection. However, as of 1975, when the First Circuit recognized that the protections of the federal Trade and Intercourse Act (1 Stat. 137 (1790), now codified at 25 U.S.C. § 177) did apply to the Maine Tribes (See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-380 (1st Circuit, 1975)), the United States has recognized and acted in furtherance of its trust responsibility to protect the lands and natural resources of the Maine Indians, beginning with the United States advocacy on the Tribes' behalf in the Maine land claims litigation. This litigation, which alleged that Massachusetts and Maine illegally took lands of the Maine Indians without federal involvement or consent in violation of the Trade and Intercourse Act, was settled through the enactment by Congress in 1980 of the Maine Indian Claims Settlement Act (MICSA), 25 U.S.C. § 1721, et seq., which ratified Maine's Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. § 6201, et seq. (Implementing Act).

Contrary to the assertions made in several of the filings before you, the United States did not through MICSA limit its trust responsibility. While the MICSA did create a unique relationship between the State of Maine and the Maine Tribes, the federal trust obligation to protect the lands and natural resources of the Maine Tribes continues. The Penobscot Nation is a federally recognized Indian Tribe (61 Fed. Reg. 58211, 58213 (1996)) and, as such, is entitled to those rights and benefits which the United States provides to Indians based upon their status as Indians. See 25 U.S.C. § 479a-1(a); H. Rep. No. 96-1353, p. 18, *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3794. The Penobscot Reservation is a federal reservation under the jurisdiction of the United States. 25 U.S.C. §§ 2 and 9.

The Department thus finds erroneous the views expressed which suggest that EPA has no special relationship with the Penobscot Indian Nation. In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. §§ 1722, 1721, 1725(i). (Subsequent Congressional action extended this federal recognition to the Aroostook Band of Micmacs. Pub. L. No. 102-171, 105 Stat. 1143 (1991).) Congress has declared that this

recognition requires that the United States protect tribal resources through the trust responsibility. Pub. L. No. 103-454, 108 Stat. 4791 (1994).

The Department further finds no merit in the claim that MICSA extinguished PIN's sovereignty. Federal recognition connotes recognition of a Tribe's inherent sovereignty. Pub. L. No. 103-454, 108 Stat. 4791 (1994). See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). Passage of MICSA did not terminate the Maine Tribes and thus did not extinguish PIN's sovereignty. Instead, as noted in the legislative history, the "settlement strengthens the sovereignty of the Maine Tribes." H. Rep. No. 96-1353 at 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3790. See also Senate Rep. No. 96-957, pp. 14-15 (1980).

It has been asserted that section 1725(h) of the MICSA, a section of the Act which reflects the unique relationship between the Maine Tribes and the State, prevents the application of the trust responsibility and federal case law interpreting its requirements in Maine (25 U.S.C. § 1725(h)). Through this section, Congress provided that the application of federal Indian law (including case law) in Maine can be precluded, but **only** if such law would affect or preempt the civil, criminal, or regulatory jurisdiction of the State. If Maine's jurisdiction is unaffected, federal law does apply. See H.R. Rep. No. 96-1353 at 19-20 (1980), *reprinted in* 1980 U.S.C.C.A.N., 3786, pp. 3794-5; Senate Report No. 96-957 at 30 (1980).

In the Department's view, section 1725(h) has no applicability to this situation.[2] The NPDES program has not been delegated by the United States to the State of Maine; it thus remains a federal program for which EPA is the permitting authority. EPA's consideration of federal law to determine its obligations to the PIN in making the NPDES permit decision, therefore, is required in this case.[3]

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[2] While the State does have authority under section 401 of the Clean Water Act to certify that a proposed discharge meets its water quality standards, this does not mean that EPA cannot impose a more stringent standard in its permit. 40 C.F.R. § 124.55(c) provides that a state may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

[3] There is also no merit to the claim that, because MICSA is an Act of Congress rather than a treaty, EPA cannot consider federal case law in determining tribal rights and federal obligations. As with a treaty, MICSA is similarly the "supreme law of the Land," and creates rights and liabilities which are virtually identical to those established by treaties. See Parravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), cert.

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. See Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), rev'd. in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) (holding that for the Secretary of Interior to fulfill his fiduciary duty to Tribe while determining amount of water to be diverted from dam for benefit of irrigation district and to detriment of tribal fishery in downstream Pyramid Lake, the "Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake"); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) (Rejecting Secretary's argument that national interest in developing coal resources outweighed trust duty and stating that "identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.") Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICSA to fully protect the PIN's rights and resources.

2. Interpretation of PIN's fishing rights

The historic treaties between PIN and Massachusetts (Maine then being part of the Massachusetts territory) provide the basis for rights expressly confirmed to the PIN through the Implementing Act and MICSA. As a result, PIN's fishing right has two components - the aboriginal right retained through treaty and confirmed by MICSA, and a statutory right included within the Implementing Act.

a. PIN's confirmed aboriginal fishing rights

Through a series of treaties which culminated in the 1818 Treaty with Massachusetts, the PIN retained the islands and natural resources, including fishing rights, within the Penobscot River, beginning at Indian Island and extending upriver. Congress, through its ratification in MICSA of the Maine Implementing Act which defined the retained Penobscot Reservation, confirmed this reservation of lands and resources, including fishing rights, to the PIN. See 30 M.R.S.A. § 6203(8); 25 U.S.C. §§ 1722(i); 1725(b)(1). While Section 1723(b) of MICSA did extinguish

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denied, 116 S. Ct. 2546 (1996); Felix Cohen, Handbook of Federal Indian Law, p. 127 (1982 ed.).

aboriginal title to lands or natural resources given up by the PIN through transactions illegal under the Trade and Intercourse Act, MICSA did **not** extinguish aboriginal title to lands or natural resources retained by the PIN. Rather, Congress confirmed those retained aboriginal rights to the PIN. According to the legislative history of MICSA, fishing rights are an example of natural resources considered "**expressly retained sovereign activities.**" H.R. Rep. No. 96-1353 at p. 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3791 (emphasis added).

I attach the brief filed by the United States in Maine's Supreme Judicial Court in Atlantic Salmon Federation v. Maine Board of Environmental Protection, 662 A.2d 206 (Me. 1995), in which the United States position regarding the PIN's fishing right is set out. In short, the brief states that:

> The Penobscot Nation's right is a reserved right, meaning it was reserved from the greater aboriginal rights of the Nation to the use and occupancy of its territory which had not been validly extinguished under 25 U.S.C. 177, prior to the enactment of the Maine Implementing Act and the federal Settlement Act ratifying its terms. The fishing right, therefore, is not a grant from the state of Maine in the exercise of its sovereign authority over fish and wildlife within its borders; it is a reservation from the aboriginal rights given up by the Penobscot Nation in the settlement which finally extinguished its aboriginal rights.

Brief for the United States as Amicus Curiae, filed before the Supreme Judicial Court of Maine in Atlantic Salmon Federation, et al., v. Maine Board of Environmental Protection, Law Docket No. Ken-94-779, January 27, 1995, (p. 15).

b. PIN's statutory fishing right under the Maine Implementing Act

In addition to PIN's retained aboriginal fishing rights within its Reservation, the Maine Implementing Act expressly confirmed to PIN a fishing right, providing that

> the members of the . . . Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance ...

30 M.R.S.A. § 6207(4). The State of Maine has only a residual right to prevent the PIN from exercising its fishing right in a manner which has a substantial adverse impact on fish stocks in or on adjacent waters - the legislative history compares this residual power to that which other states retain with respect to federal Indian treaty fishing rights. See H.R. Rep. No. 96-1353 at p. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, p. 3793. Indeed, the State of Maine has acknowledged that, in recognition of "traditional Indian activities" such as fishing, preferential

treatment is to be provided to Maine Indians. See letter from Attorney General Richard Cohen to Senator John Melcher (August 12, 1980), reprinted in U.S. Senate, Select Committee on Indian Affairs, Hearings on S. 2829, Proposed Settlement of Maine Indian Land Claims. See also Letter from Maine Attorney General James Tierney to Atlantic Sea Run Salmon Commission Chair William Vail (Feb. 16, 1988), in which the State recognized that the Penobscot Nation possesses a right to take fish from the Penobscot River for consumption in a manner otherwise prohibited by state law, due to the provisions in the Maine Implementing Act. (Copies attached.)

As provided in the Implementing Act, the PIN fishing right applies within the boundaries of the Penobscot Reservation, as it is defined in the Implementing Act. The Reservation is defined to expressly include the islands in the Penobscot River, beginning at Indian Island and continuing upriver, which were reserved by the PIN in its historic treaties. 30 M.R.S.A. § 6203(8). In those treaties, the PIN ceded lands beginning at the river's edge and extending upland, thereby retaining its rights to the beds and banks of the Penobscot River. See Wilson & Son v. Harrisburg, 107 Me. 207, 210 (1910). Pursuant to the 1818 Treaty, PIN's riparian ownership to the bed and banks of the river is limited only by the commonly recognized right of the public to use the river for navigation. See Pearson v. Rolfe, 76 Me. 380, 386 (1884). In confirming the PIN Reservation, the Implementing Act recognized the retention of PIN's riparian rights to the Penobscot River, including the beds and banks of the river.[4]

As a riparian owner, PIN possesses certain rights under state law which relate to the interpretation of its statutorily-based fishing right. Maine law recognizes that a riparian proprietor, such as the PIN, has a legal right:

> **to take fish from the water over his own land, to the exclusion of the public.** Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec., 333. He does not own the water itself, but he has the right to the natural flow of the stream, and the right to the use and benefit of it, as it passes through his land, for all the domestic and agricultural purposes to which it can be reasonably applied, and **no proprietor above or below can unreasonably divert, obstruct or pollute it.** Waluppa Reservoir Co. v. Fall River, 147 Mass., 548, 554, 18 N.E. 465, 1 L.R.A., 466; Auburn v. Water Power Co., 90 Maine 576-585, 38 Atl. 561, 38 L.R.A., 188.

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[4] Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037, "An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to create the Passamaquoddy Indian Territory and Penobscot Indian Territory," included within Appendix, Senate Select Committee on Indian Affairs, hearing July 1-2, 1980.

> The only limitation upon the absolute rights of riparian proprietors in non-tidal rivers and streams is the public right of passage for fish, and also for passage of boats and logs. ... All these rights which the riparian proprietor has in the running streams are as certain, as absolute, and as inviolable as any other species of property, ...

Opinion of the Justices of the Supreme Judicial Court, 118 Me. 503, 507 (1919) (emphasis added).

The PIN Reservation encompasses the area into which Lincoln discharges its outfall. As such and as a riparian proprietor, PIN possesses certain rights under Maine law, including the right to take fish and the right that others not unreasonably pollute the waters overlying those lands.

3. PIN's right to appeal

The Department finds particularly questionable the attempt to have EPA deny the PIN's right of appeal. We have examined the NPDES regulations which define standing to request a hearing in this matter. In the Department's view, PIN is an "interested person" as provided in 40 C.F.R. §124.74, which is the sole indicated criterion for filing a request for hearing. Moreover, the PIN meets the criteria under the definitions for "Indian Tribe" and of "person" under 40 C.F.R. § 124.2 as well. The definition for "Indian Tribe" specifically states that "[f]or the NPDES program, the term 'Indian Tribe' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 124.2. PIN meets these requirements. There would appear, thus, no grounds on which to contest PIN's status to request an evidentiary hearing in this proceeding.

Thank you for this opportunity to provide the views of the Department. Please contact me if you have any further questions.

Sincerely,

Edward B. Cohen
Deputy Solicitor

Enclosures

cc: The Honorable Francis Mitchell, Chief, PIN
Patty Goldman, Sierra Club Legal Defense Fund
Paul Stern, State of Maine, Office of the Attorney General
Kate Geoffroy, Pierce Atwood

EPA, Office of General Counsel, Washington, D.C.
EPA, Office of Regional Counsel, EPA, Boston
EPA, Indian Desk, Washington, D.C.
Department of Justice, Indian Resources Section
Department of Justice, Office of Tribal Justice
Office of the Regional Solicitor, Boston
Bureau of Indian Affairs, Office of Trust Responsibilities
Bureau of Indian Affairs, Eastern Area Office
Fish and Wildlife Service, Maine Field Office

Mary Settles

From: Kaighn Smith, Jr. <KSmith@dwmlaw.com>
Sent: Monday, July 30, 2018 1:52 PM
To: Mary Settles
Cc: Kirk Francis
Subject: FW: Alexandra Dunn

See her email address below. Exhibits coming soon. Please add the following to the cc line:

cc: Penobscot Nation Tribal Council (delivered by hand)
Hon. John Tahsuda III, DOI Principal Deputy Assistant Secretary (via email)
Mark Chavaree, Esq., Staff Attorney, Penobscot Nation (delivered by hand)
Kaighn Smith, Jr., Esq., Litigation Counsel, Penobscot Nation (via email)

From: Chena Immel
Sent: Monday, July 30, 2018 12:38 PM
To: Kaighn Smith, Jr. <KSmith@dwmlaw.com>
Subject: Alexandra Dunn

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DrummondWoodsum
ATTORNEYS AT LAW

Mary Settles

From: Kaighn Smith, Jr. <KSmith@dwmlaw.com>
Sent: Monday, July 30, 2018 2:03 PM
To: Mary Settles
Subject: FW: Alexandra Dunn
Attachments: PENOBSCOT NATION LETTERHEAD (2) (2).DOCX

Mary: Please add the date as highlighted in attached.

From: Kaighn Smith, Jr.
Sent: Monday, July 30, 2018 1:52 PM
To: 'Mary Settles' <Mary.Settles@penobscotnation.org>
Cc: Kirk Francis (Kirk.Francis@penobscotnation.org) <Kirk.Francis@penobscotnation.org>
Subject: FW: Alexandra Dunn

See her email address below. Exhibits coming soon. Please add the following to the cc line:

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Kaighn Smith, Jr., Esq., Litigation Counsel, Penobscot Nation (via email)

From: Chena Immel
Sent: Monday, July 30, 2018 12:38 PM
To: Kaighn Smith, Jr. <KSmith@dwmlaw.com>
Subject: Alexandra Dunn

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EXHIBIT D

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

APR 2 7 2018

Honorable Matthew Z. Leopold
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes

Dear Mr. Leopold:

In 2014, the Environmental Protection Agency ("EPA") requested the views of the Department of the Interior (the "Department") regarding tribal fishing rights in Maine and the relationship between tribal fishing rights and water quality. The request was prompted by EPA's review of proposals from the State of Maine to implement Water Quality Standards ("WQS") within waters set aside for federally recognized tribes under State and Federal laws for uses that EPA characterized as sustenance fishing.

By letter dated January 30, 2015 (the "2015 Letter"), the Department's Solicitor responded with the Department's views on the fishing rights of the four federally recognized tribes in Maine: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs (collectively the "Maine Tribes").[1] These views were limited to the unique history and circumstances of the Maine Tribes. The Solicitor there noted that issues relating to at least some Indian lands and territories in the State of Maine were also the subject of ongoing litigation in the U.S. District Court for the District of Maine (the "District Court").[2] This litigation is still ongoing.[3]

Since 2015, EPA has referenced the 2015 Letter in other contexts, in particular in the promulgation of federal WQS for the State of Washington.[4] The Department, however, has not undertaken a similar legal and historical analysis of other tribes or states; and as a result, cannot speak to fishing rights outside the State of Maine. The conclusions of the 2015 Letter were the

[1] Letter from Hilary C. Tompkins, Solicitor, U.S. Dept. of the Interior, to Avi S. Garbow, General Counsel, U.S. Environmental Protection Agency (Jan. 30, 2015) (the "2015 Letter").
[2] 2015 Letter at 1, n. 1, citing Order on Pending Motions, *Penobscot Nation v. Mills*, 1:12-cv-0254-GZS (D. Maine Feb. 4, 2014).
[3] *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me.), *aff'd in part and vacated in part*, 861 F.3d 324 (1st Cir. 2017), *petition for rehearing en banc filed* (1st Cir. Sept. 14, 2017) (Nos. 16-1424, 16-1435, 16-1474, 16-1482).
[4] U.S. Environmental Protection Agency, Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 28, 2016).

result of thoughtful consideration of the unique and complicated interplay among agreements between Massachusetts or Maine and the tribes,[5] the Indian Nonintercourse Acts,[6] the Constitution of the State of Maine,[7] Federal and State court decisions, and settlement acts that acknowledge by statute certain rights of the Maine Tribes.

In connection with this clarification, the Department has undertaken further analysis of the issues discussed in the Solicitor's 2015 Letter, including subsidiary rights to water quality based on the nature of statutorily-acknowledged treaty rights, and the scope of "sustenance" fishing.

After a thorough review of the materials referenced in the 2015 Letter, we affirm the conclusion that the Penobscot Nation and the Passamaquoddy Tribe (the "Southern Tribes") enjoy federally-protected tribal fishing rights. We further affirm our previous position that to be rendered meaningful, these fishing rights by necessity include some subsidiary rights to water quality,[8] and that EPA could take into account such rights when evaluating the adequacy of WQS in Maine.[9]

As described in the 2015 Letter, the Southern Tribes enjoy expressly reserved fishing rights that are based on aboriginal riparian or littoral rights acknowledged or reflected in agreements with the Commonwealth of Massachusetts and the State of Maine or by operation of State law,[10] and ultimately acknowledged and protected by federal statute. These rights were later confirmed in the Constitution of the State of Maine,[11] of which Congress took notice when the State was admitted to the Union.[12]

As you are aware, the Southern Tribes' long-recognized aboriginal fishing rights[13] were incorporated into legislation known as the Maine Implementing Act (the "MIA"), which was subsequently ratified by Congress through the Maine Indian Claims Settlement Act of 1980 ("MICSA" and together with the MIA, the "Settlement Acts"):[14]

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[5] These agreements were negotiated not with the United States but with the Commonwealth of Massachusetts and the State of Maine. The text of each agreement is available at http://www.wabanaki.com.

[6] As described in *Joint Tribal Coun. of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 652 n. 1 (D. Me. 1975), the Nonintercourse Act passed in 1793 "provided that (...) "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 1 Stat. 329, 330. This version was carried forward, without major change, in the 1796 Act, 1 State. 469, 472; the 1799 Act, 1 Stat. 743, 746; the 1802 Act, 2 Stat. 139, 143; [and] the 1834 Act (...)."

[7] Me. Const. art. X, § 5.

[8] 2015 Letter at 7.

[9] 2015 Letter at 1.

[10] 2015 Letter at 2, referencing the Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[11] "The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, toward the Indians within said District of Maine, whether the same arise from treaties, or otherwise." Me. Const. art. X, § 5.

[12] 16 Stat. 1 544 (March 3, 1820).

[13] 2015 Letter at 2, n. 9 (defining the Southern Tribes' reserved rights as rights retained since aboriginal times).

[14] 25 U.S.C. § 1721(b)(2).

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6 [providing a process by which the State can limit tribal sustenance fishing if necessary to protect fish stocks].[15]

Whereas our review of the record affirms the analysis by which the Solicitor's 2015 Letter recognized the Southern Tribes' extant right to sustenance fishing,[16] we find ourselves unable to identify with similar clarity federally-protected tribal fishing rights for the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (the "Northern Tribes"). And while we affirm the proposition contained in the 2015 Letter that express language in a treaty is not necessary to establish the existence of a tribal fishing right,[17] we note that such rights *only* arise from treaty, statute, the federal set aside and supervision of lands that include bodies of water inhabited by fish, or the retention of aboriginal rights. Despite concerns about whether the Northern Tribes' retained their fishing rights, we continue to recognize the centrality of sustenance fishing to the culture of the Northern Tribes.[18]

We now turn to the Department's interpretation of the term "sustenance," which the Settlement Acts do not define.[19] In the 2015 Letter, the Solicitor concluded that "sustenance" encompasses "at least the right of tribal members to take sufficient fish to nourish and sustain them, with no specific quantitative limits other than the conservation necessity limit (...)."[20] Rather than relying on this broad definition, we believe that the wiser course is to rely on language previously adopted by the United States in its brief before the Maine Supreme Court in *Atlantic Salmon Federation v. Maine Board of Env'tl Protection*:

> [T]he right to take fish is not limited by time or the other needs of society (other than preservation of the fish resource itself). In contrast, some other reserved hunting and fishing rights in federal Indian treaties limit the exercise of those rights to the period during which land is unclaimed or the area unsettled. In short, the Penobscot Nation

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[15] 30 M.R.S. § 6207(4). The Maine Implementing Act additionally provides for a statutorily-acknowledged right for the Southern Tribes to enact ordinances that allow for tribal sustenance fishing on certain ponds on trust lands located outside the Southern Tribes' reservations. 30 M.R.S. § 6207(1).

[16] Notwithstanding the holding in *Penobscot Nation v. Mills*, 861 F.3d 324, 336 (1st Cir. 2017) that the Tribe lacked standing to litigate sustenance fishing rights claims, the Department takes the position that the Tribe's sustenance fishing rights in the Penobscot River also include some subsidiary rights to water quality sufficient to render those fishing rights meaningful.

[17] 2015 Letter at 4-5.

[18] U.S. Environmental Protection Agency, *Promulgation of Certain Federal Water Quality Standards Applicable to Maine*, 81 Fed. Reg. 92,466, 92,472 (Dec. 19, 2016). It is our view that consultation with the Northern Tribes would demonstrate a reliance on sustenance fishing that could influence WQS in the waters of the Northern Tribes such that they may not be dissimilar from the WQS established for the Southern Tribes, pursuant to statutorily-acknowledged agreements.

[19] 2015 Letter at 4. Though the District Court in *Penobscot Nation v. Mills* distinguished between sustenance, commercial, and recreational fishing, 151 F. Supp. 3d 181, 198 (D. Me. 2015), the First Circuit concluded that the district court lacked jurisdiction to consider the Penobscot Nation's "sustenance" fishing rights. *Penobscot Nation v. Mills*, 861 F.3d 324, 336 (1st Cir. 2017).

[20] *Id.*

> reserved fishing right is one to "take," i.e. obtain, fish in perpetuity. It is limited to the reservation, and it is limited to sustenance, rather than commercial, purposes (...).[21]

The fishing rights at issue, aboriginal in nature, are reflected in various agreements entered into with the Southern Tribes, and ultimately reaffirmed through federal statute. The understanding and exercise of those rights by the Southern Tribes at the time the agreements were negotiated provide evidence of the scope of these rights.[22] This is consistent with the Department's long-standing approach to treaty interpretation and is supported by the analysis of federal courts similarly engaged: "[Treaties] must therefore be constructed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[23]

The Supreme Court counsels that the interpretation of treaties should go "beyond the written words to the larger context that frames the treaty, including the history of the treaty, negotiations, and the practical construction adopted by the parties."[24]

The Department has reviewed the *Wabanaki Traditional Cultural Lifeways Exposure Scenario* (the "Wabanaki Study"), a study funded by EPA in collaboration with the Maine Tribes and published in 2009.[25] While the Wabanaki Study's conclusions as to dietary habits and resource utilization patterns are generally helpful in understanding the ecology and nutritional landscape of pre-industrial Maine, we find that its definition of "subsistence"[26] and its reliance on evidence from so broad a historical period likely does not adequately reflect fish consumption in the period between 1794 and 1822, when the relevant agreements were negotiated.[27] Relying as it does on dietary estimates from the 16th through 19th centuries, the Department additionally notes that the Wabanaki Study was not intended to identify contemporary tribal fish consumption patterns.

The Department affirms the position that the statutorily-acknowledged sustenance fishing rights codified under MIA § 6207(4) derive from aboriginal rights, which in part are reflected in practices dating back to the aforementioned agreements, but which were ultimately acknowledged by federal statute. We further affirm that sustenance fishing rights guaranteed to the Southern Tribes includes some subsidiary rights to water quality sufficient to enable sustenance fishing.

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[21] Brief for the United States as Amicus Curiae at 14, *Atlantic Salmon Federation v. Maine Board of Env'tl Protection*, 662 A.2d 206 (Me. 1995).
[22] The Department takes no position on EPA's determinations or methodologies regarding fish consumption rates and WQS standards in other states and expressly limits our analysis to tribal fishing rights in the state of Maine.
[23] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 442 U.S. 658, 675-676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).
[24] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).
[25] 81 Fed. Reg. at 92,473, citing Barbara Harper and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario* (Jul. 9, 2009).
[26] The Wabanaki Study used the term "subsistence" to refer to "hunting, fishing, and gathering activities that are fundamental to the way of life and health" of indigenous peoples. Wabanaki Study at 16.
[27] *Id.* at 9.

Subject to the clarifications described above, we therefore affirm the Department's view expressed in the 2015 Letter that tribal fishing rights encompass subsidiary rights that may not be expressly stated in the language of a treaty or statute but that are necessary to render those rights meaningful.[28] In so doing, we expressly constrain this analysis to the Southern Tribes of Maine.

Sincerely,

Daniel H. Jorjani
Principal Deputy Solicitor

[28] 2015 Letter at 7.